No. 220

JUL 22 1957

JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1957

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

MERRY BROTHERS BRICK AND TILE COMPANY, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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estion Presented 1
tement 3
gument:
A. The petition presents no important question of federal law which needs to be settled by this Court 4
B. The decisions below are clearly correct 7
nclusion 10
pendix:
Dragon Cement Company, Inc. v. *United States*, — F. 2d — 13
United States v. *Merry Brothers Brick and Tile Company*, 242 F. 2d 708 28

CITATIONS

ses:
American Gilsonite Company, 28 T.C. —, No. 22 (1957) 6
Dragon Cement Company, Inc. v. *United States*, 144 F. Supp. 188, reversed, — F. 2d — 5
Dragon Cement Company, Inc. v. *United States*, — F. 2d — 4, 7
Harvey v. *United States*, 57-1 U.S.T.C. ¶ 9473 6
Helvering v. *Mountain Producers Corporation*, 303 U.S. 376 8
International Tale Company, 15 T.C. 981 6
New Idria Quicksilver Mining Company v. *United States*, 144 F. 2d 918 4
Riverton Lime & Stone Company, Inc., 28 T.C. —, No. 49 6
The Haviland Clay Works Company v. *United States*, 56-1 U.S.T.C. ¶ 9297 6
Townsend v. *The Hitchcock Corporation*, 232 F. 2d 444 4
United States v. *Cherokee Brick & Tile Company*, 218 F. 2d 424 ..... 4, 5
United States v. *Merry Brothers Brick and Tile Company*, 242 F. 2d 708 4
United States v. *Sapulpa Brick & Tile Corporation*, 239 F. 2d 694 4

Statutes:

	Page
Internal Revenue Code of 1939:	
Sec. 114(b) (26 U.S.C. 1952 ed., Section 114(b))	2, 9
Internal Revenue Code of 1954:	
Sec. 613(c) (26 U.S.C. 1952 ed., Supp. II, Section 613(c))	2
Miscellaneous:	
Rules of the Supreme Court, Rule 19	6
T.D. 6031, C.B. 1953-2, 120	9
Treasury Regulations 111, Sec. 29.23(m)-1	9
Webster's New International Dictionary, Unabridged (2d ed. 1953)	2

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

This brief in opposition is filed on behalf of the respondents in the thirteen cases covered by the petition for a writ of certiorari.

Question Presented

The Government's statement of the question presented (Pet 2-3) is inaccurate and misleading. Under the Internal Revenue Code, taxpayers' percentage depletion deduction is to be computed as a percentage of "gross income from the property," which the Code

specifically defines as "gross income from mining." The Code[1] then specifically broadens the meaning of "mining" as generally understood:[2]

> "The term 'mining' *as used herein* shall be considered to include *not merely* the extraction of the ores or minerals from the ground *but also* the ordinary treatment processes normally applied by mine owners or operators in order to obtain the *commercially marketable mineral product or products* . . . " (Emphasis supplied.)[3]

The question presented is:

> Where taxpayers extract clay from their own deposits and process it into burnt clay products (such as brick and tile), and the undisputed facts show (1) that taxpayers' clay is not commercially marketable until put into the form of such burnt

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[1] Internal Revenue Code of 1939, Section 114(b)(4)(B), set forth in the petition, p. 43. The corresponding provision of the Internal Revenue Code of 1954, Section 613(c) (Pet. 47), is substantially the same.

[2] The basic fallacy in the Government's petition is its complete disregard of this language, wherein Congress has specifically and deliberately departed from and enlarged the meaning of "mining" ("business of making or of working mines") found in the dictionary. (See Webster's New International Dictionary, Unabridged (2d ed. 1953).

[3] The petition (pp. 2, 10, 19, 20) is replete with the suggestion that the decisions below allow a taxpayer to compute his depletion allowance on the sales price of a "manufactured" or "finished" product whenever "he chooses to combine [manufacturing] activities with his mining activities." (Pet. 19) This is simply not the case. Under the decisions below, the applicable percentage is applied to the

clay products, (2) that owners and operators of such clay deposits must normally process their clay into such burnt clay products in order to obtain products which they can market commercially, and (3) that the taxpayers' processes are the ordinary ones used to produce such products, are the processes which taxpayers thus apply included in the statutory term "mining".

Statement

The Statement in the petition (pp. 3-7) sets forth some of the facts involved in these cases. However, it omits any reference to the essential facts on which the decisions below are based, namely:[4]

(1) that the taxpayer's brick and tile clay is not commercially marketable until it is processed into burnt clay products (R. 62);

(2) that only negligible amounts of the brick and tile clay mined in the United States can be sold before it is processed into such products (R. 62); and

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selling price of the first "commercially *marketable* mineral product", that is, the first product which is *marketable* in commerce, whether that is a "crude" product or a "manufactured" or "finished" product. If a taxpayer should choose to apply a process subsequent to those normally applied to obtain a *marketable* product, that process would not be "mining", because the product would be commercially *marketable* before it was applied.

[4] Record references are to the *Merry Brothers* case. The petition correctly states (p. 7) that, "The facts and issues in the remaining cases are in all material respects the same as in the *Merry* and *Reliance* cases."

(3) that taxpayer's processes are the ordinary treatment processes by which brick and tile clay generally is extracted from the ground and processed into such products, and are the processes normally employed by the industry (R. 59).

The District Court held that taxpayer's depletion deduction is to be computed on the selling price of its burnt brick and tile (R. 62), and the Court of Appeals affirmed. (Appendix, pp. 28-35)

Argument

A. *The petition presents no important question of federal law which needs to be settled by this Court.*

The sole question in these cases is one of statutory construction. The petition (p. 11) recognizes that this question has been decided against the Government by four Courts of Appeals (the First, Fourth, Fifth and Tenth Circuits).[5] These Courts, with fourteen circuit judges (including four chief judges) participating,

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[5] *United States* v. *Cherokee Brick & Tile Company*, 218 F. 2d 424 (5th Cir. 1955); *Townsend* v. *The Hitchcock Corporation*, 232 F. 2d 444 (4th Cir. 1956); *United States* v. *Sapulpa Brick & Tile Corporation*, 239 F. 2d 694 (10th Cir. 1956); *Dragon Cement Company, Inc.* v. *United States*, — F. 2d — (1st Cir. 1957); and the decision below, *United States* v. *Merry Brothers Brick & Tile Company*, 242 F. 2d 708 (5th Cir. 1957).

Judge Magruder's opinion in the *Dragon Cement* case, together with the opinion of the court below, is reproduced herein in the Appendix, pp. 13-35.

Taxpayers' position is also supported by the earlier case, not mentioned by the Government, of *New Idria Quicksilver Mining Co.* v. *Commissioner*, 144 F. 2d 918 (9th Cir. 1944).

have written five considered opinions, without a single dissent. There is no conflict among the circuits. In all five opinions, the Courts hold that the statutory language is "clear and unambiguous", and they are in complete agreement as to its meaning. They carefully consider and reject all arguments made by the Government.

The Government appealed the instant cases to the Fifth Circuit, which had previously decided the issue in *United States* v. *Cherokee Brick & Tile Company*, *supra*, note 5, and asked that Court to reconsider and overrule that decision. The cases were argued before three circuit judges, none of whom had participated in the *Cherokee* decision. The Fifth Circuit, upon "the fullest and most careful re-examination and reconsideration" of the *Cherokee* decision, reaffirmed it, "since the undisputed facts and every sound consideration of statutory construction and application support indeed compel the conclusion that it was right and should be adhered to." (Appendix, pp. 30-31)

Furthermore, with the single exception of one District Court decision which has now been reversed,[6] the numerous District Courts which have considered this question, as well as the Tax Court, have all decided it in exactly the same way.[7]

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[6] *Dragon Cement Company, Inc.* v. *United States*, 144 F. Supp. 188 (D. Me. 1956), reversed by the First Circuit; see note 5, *supra*. The reasoning of this District Court is so obviously erroneous that the Government does not even suggest it in its petition.

[7] In addition to the District Court decisions in the Fourth, Fifth and Tenth Circuits which have been affirmed by the respective Courts of Appeals, the issue has been decided

Faced with this array of adverse decisions, the Attorney General asks for a writ of certiorari, principally on the ground that the issue involves "hundreds of millions of dollars of revenue." (Pet. 8)[8] The fact that a large amount of revenue is involved does not mean, in the sense of Rule 19, that there is an "im-

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the same way by District Courts in the Sixth and Ninth Circuits. *The Haviland Clay Works Company* v. *United States*, 56-1 U.S.T.C. ¶ 9297, 1956 P.-H. Fed. Tax Service ¶ 72,449 (N.D. Ohio 1956); *Harvey* v. *United States*, 57-1 U.S.T.C. ¶ 9473, 1957 P.-H. Fed. Tax Service ¶ 72,532 (D. Ariz. 1957).

The Tax Court has consistently taken the same position. *International Talc Company*, 15 T.C. 981 (1950); *American Gilsonite Company*, 28 T.C. —, No. 22 (1957); *Riverton Lime & Stone Company, Inc.*, 28 T.C. —, No. 49 (1957).

[8] We question the accuracy of the estimates made in the petition (pp. 11-12) on the basis of the unverified, unsupported and unexplained data transmitted over the signature of the Acting Commissioner (Pet. 58-61), and we strenuously object to their inclusion, since they are not a part of the record in any of these cases. Since the dollar amount involved has no proper bearing on whether a writ of certiorari should be granted, there is no occasion to search out all the unjustified assumptions and errors infecting that material. It might be noted, however, that the Government's estimate completely ignores the statutory limitation of the depletion deduction to 50% of "net income from the property". It also assumes the lack of a market for all minerals listed in the Appendix, before they are processed into some "finished" product, although the applicability of the legal principle of these cases will depend entirely on the purely factual question of marketability. There is no basis, therefore, for the Government's assumption that this legal principle will cause a loss of revenue in the amounts estimated as to all those minerals. (Pet. 60-61)

portant question of federal law which has not been, but should be, settled by this court." Since the sole issue here has been carefully considered and settled by four different Courts of Appeals (which have not been kept in the dark as to the amounts of revenue involved), and since those courts unanimously agree that the statute is "clear and unambiguous," we submit that such issue is now so lacking in substance that it is not sufficiently "important" to warrant review by this Court, regardless of the amounts involved. In fact, there is no *real* question left.[9]

The complete unanimity among the Courts of Appeals on the present question of statutory construction is, we submit, a decisive reason for denial of certiorari. *If there can ever be a situation of any importance to the revenue where an issue is settled short of a decision by this Court, these cases present that situation.*

B. *The decisions below are clearly correct.*

In view of the unanimity of the Courts of Appeals, we submit that there is no occasion for this Court independently to consider the merits of the issue here involved in passing on the Government's petition. If, however, this Court should feel called upon to inquire into the merits, a reading of the *Dragon Cement* opinion and the opinion below will establish that the deci-

[9] Review by this Court certainly is not necessary in order to put an end to recurring litigation on this issue. Denial of certiorari here would undoubtedly cause the Government to conform its position to the overwhelming authority against it.

sions below are clearly correct.[10] These opinions conclusively show that the Government's arguments, both those here made and others now abandoned, are completely without merit under the statute and should be addressed, if at all, to Congress, not to the courts.[11]

While any argument on the merits here would be superfluous, we do feel that we should correct the Government's misstatements concerning the regulation here involved. The Government erroneously states that the portion of the regulation here involved is of long

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[10] In the Appendix, where these opinions are reproduced, those portions of the opinions relating particularly to the Government's arguments here are printed in bold type (pp. 18-19, 23, 25, 32-35).

[11] For example, the Government attempts to show that the statute, as applied by the courts below, "produces grave inequities within and among classes of taxpayers" and that these decisions will not give "a uniform application to a nationwide scheme of taxation". (Pet. 19, 20). The amount of depletion for various ores and minerals is clearly a matter for Congress to determine. Of course, under the statute there will be some variation among producers of the same mineral, due to differences in local prices, products produced, net income, royalties paid, etc. Such variations are inherent in percentage depletion as this Court stated in *Helvering* v. *Mountain Producers Corporation*, 303 U.S. 376, 381 (1938):

> "But to appraise the actual extent of depletion on the particular facts in relation to each taxpayer would give rise to problems of considerable perplexity and would create administrative difficulties which it was intended to overcome by laying down a simple rule which could be easily applied. To this end, the taxpayer was permitted to deduct a specified percentage of his gross income from the property. See *United States* v. *Dakota-Montana Oil Co.*, 288 U.S. 459, 461.

standing and constitutes a contemporaneous construction of the Statute. (Pet. pp. 9, 17-18.) The portion of the regulation on which the Government relies relates to situations where the mine owner applies processes *beyond* "ordinary treatment processes" and is not applicable here.[12] The validity of that portion of the regulation is not here involved. The portion of the regulation which has been held invalid by the courts below, that is, the portion which would exclude from "ordinary treatment processes" a number of the processes required to make brick and tile ~~clay~~, is not of long standing and does not constitute a contemporaneous construction of the statute; it was first promulgated on July 14, 1953, *almost ten years after the enactment* of Section 114(b)(4)(B).[13] It has no counterpart in any prior regulation.

Congress was free to give such an arbitrary allowance as the deduction was an act of grace. In answer to the contention that the provision may produce 'unjust and unequal results,' we have remarked that this is likely to be so 'wherever a rule of thumb is applied without a detailed examination of the facts affecting each taxpayer.' *Helvering* v. *Twin Bell Syndicate*, 293 U.S. 312, 321."

[12] That portion of Section 29.23(m)-1(f) of Treasury Regulation 111 on which the Government relies and which it quotes in the petition (p. 9, note 7) provides for computing "gross income from the property" in a case where the mine owner or operator processes an ore or mineral *beyond* "ordinary treatment processes". In view of the holding below that all of taxpayers' processes are "ordinary treatment processes", the quoted portion of the regulation is inapplicable here.

[13] This portion of Section 29.23(m)-1(f), added by T. D. 6031, C. B. 1953-2, 120 (Pet. 49 at 51), purports to interpret

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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the statutory term "ordinary treatment processes" so as to exclude therefrom treatment effecting a chemical change, blending with other material, thermal action, fine pulverization, pressing into shape and molding.

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July, 1957

APPENDIX

Bold type in Appendix is supplied by Counsel, italics by the Courts

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5186

DRAGON CEMENT COMPANY, INC.,
Plaintiff, Appellant

v.

UNITED STATES OF AMERICA,
Defendant, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

[144 F. Supp. 188]

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

OPINION OF THE COURT

May 14, 1957

MAGRUDER, *Chief Judge*. Appellant, a Maine corporation, in its capacity as successor (by merger effective November 30, 1951) to Lawrence Portland Cement Company, a Pennsylvania corporation, brought this action in the United States District Court for the District of Maine, seeking recovery of federal income and excess profits taxes for the

period January 1 to November 30, 1951, in the amount of $483,522.19, with interest. The facts were not in dispute and were recited in a stipulation. Both parties having moved for summary judgment, the district court on September 24, 1956, entered a judgment the first paragraph of which (as subsequently amended) decreed that the plaintiff recover of the defendant the sum of $10,546.46, with interest, on account of a deductible tax loss under § 23(f) of the Internal Revenue Code of 1939, an issue which is no longer in the case, and the second paragraph of which decreed as follows:

> "2. That plaintiff take nothing further in consequence of plaintiff's complaint as to the issue of percentage depletion and as to that issue, the action be and it is hereby dismissed on the merits."

The taxpayer has appealed from that portion of the judgment denying recovery to it under the percentage depletion issue, so that the case now before us turns solely on a question of statutory interpretation of § 114(b)(4)(B) of the 1939 Code, as amended, which defines the term "gross income from mining" for use in determining the basis for percentage depletion allowed as a deduction from income derived from certain mines and natural mineral deposits.

The allowance for depletion has been a controversial subject for years, and officials of the executive branch have sought from time to time, with conspicuous lack of success, to persuade the Congress to eliminate some of its alleged overgenerous features. See Mertens, Law of Federal Income Taxation § 24.04 (1954). We are not concerned with the wisdom or policy of the statutory allowance, once we are sure what the allowance is, for it is plainly our judicial function merely to apply the allowance as Congress wrote it and meant it.

The need for and fairness of some allowance for depletion proceeds from the fact that the production of income through the exploitation of natural resources is accompanied by an inevitable consumption of capital in the form of the gradual exhaustion of the natural resource being exploited. Thus the allowance serves to offset the injustice of classifying only as income what might be regarded as income comingled with return of capital, and serves also as an incentive to encourage capital expenditures in the direction of discovery and exploitation of natural resources.

Of the three types of depletion allowance prescribed at various times by the Congress, percentage depletion (with which we are now concerned) is to be contrasted with cost depletion and discovery depletion. Cost depletion, based upon the cost to the taxpayer of the particular deposit, seeks to return to the taxpayer free of tax that portion of his cost attributable to the amount of the deposit used up in earning the income on which he is taxed during a given taxable year. Discovery depletion seeks to reward the taxpayer for the discovery of unknown natural deposits, and has usually been based upon the fair market value of the deposit within thirty days after the date of its discovery. By the third type of depletion allowance, percentage depletion, the Congress hoped to furnish an easily computable allowance that would avoid many of the complications arising in connection with the computation of cost or discovery depletion. Percentage depletion is based upon a fixed percentage of the income realized during the taxable year from the exploitation of a piece of property—the percentage varying, somewhat arbitrarily, depending upon the kind of deposit involved.

With the gradual enlargement of the categories of mineral properties to which the percentage depletion became applicable, the Congress has at the same time automatically

eliminated discovery depletion in respect to such deposits.[1] In general, percentage depletion has remained as an alternative to cost depletion, so that even if the taxpayer fails to establish the cost of the property, he nevertheless may be entitled to the allowance of a percentage depletion. It is also true, as pointed out in Mertens, Law of Federal Income Taxation § 24.31a (1954), "that through percentage depletion a taxpayer may recover more than his cost over the life of the property."

For present purposes we need go no further back than to the provisions of the Internal Revenue Code of 1939.

Section 23 of this Code contained the following (53 Stat. 12, 14):

> "Sec. 23. Deductions from Gross Income.
>
> In computing net income there shall be allowed as deductions: . . .
>
> (m) Depletion.—In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. . . .
>
> (n) Basis for Depreciation and Depletion.—The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114."

Section 114(b)(1) stated as the general rule (53 Stat. 45) that the basis for the depletion allowance should be the adjusted basis in § 113(b) for determining gain upon

[1] The 1954 Code has now abolished discovery depletion entirely as applied to future years.

the sale or other disposition of such property, except as otherwise provided in the ensuing paragraphs numbered (2), (3), and (4). Paragraph (2) related to discovery value in the case of certain mines. Paragraph (3) gave a percentage depletion formula for oil and gas wells. Paragraph (4) gave percentage depletion formulas for coal, metal, and sulphur mines (but not including the type of deposit involved in the case at bar), and provided allowances based upon a prescribed percentage of the "gross income from the property during the taxable year".

The phrase "gross income from the property" was undefined as it appeared in the 1939 Code. It thus had a lurking ambiguity where the mine owner customarily performed more than merely extractive operations before realizing any income; in such cases, would the basis for the depletion allowance include gross income from what in other contexts might be described as manufacturing operations upon the extracted property? The statute did not make this point clear, and Regulations 111, as originally issued, naturally sought to narrow the scope of the allowance.

In the Revenue Act of 1943 (58 Stat. 43), the Congress attempted to resolve this ambiguity by inserting a definition of "gross income from the property" in a new § 114 (b)(4)(B), reading in part as follows:

> "(B) Definition of Gross Income From Property.—As used in this paragraph the term 'gross income from the property' means the gross income from mining. The term 'mining', as used herein, shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products. The

term 'ordinary treatment processes', as used herein, shall include the following: (i) In the case of coal—cleaning, breaking, sizing, and loading for shipment; (ii) in the case of sulphur—pumping to vats, cooling, breaking, and loading for shipment; (iii) in the case of iron ore, bauxite, ball and sagger clay, rock asphalt, and minerals which are customarily sold in the form of a crude mineral product—sorting, concentrating, and sintering to bring to shipping grade and form, and loading for shipment; and (iv) in the case of lead, zinc, copper, gold, silver, or fluorspar ores, potash, and ores which are not customarily sold in the form of the crude mineral product—crushing, grinding, and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation, leading, crystallization, precipitation (but not including as an ordinary treatment process electrolytic deposition, roasting, thermal or electric smelting, or refining), or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the ore, including the furnacing of quicksilver ores."

It is apparent that the Congress intended not to limit the computation of the percentage depletion allowance to the gross income attributable to purely extractive processes, for the deposit when thus first extracted might not be in a commercially marketable form, and might require further processing. Congress accomplished this by providing for the first time a general formula, and by giving nonexclusive illustrations of processes included in the phrase "ordinary treatment processes". See § 3797(b) of the Code of 1939, 53 Stat. 470. The general formula, which of course is controlling, is that the basis for computing the percentage depletion allowance shall be the

"gross income from mining", defined as including "not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products." Thus we must look to see what processing is normally undertaken by a mine owner or operator in order to obtain a commercially marketable product, and when such a salable product is obtained, then the gross income from the sale of such product is the base upon which to apply the percentage depletion allowance. That these "ordinary treatment processes" are not necessarily limited to those processes which leave the extracted deposit in its natural state is clear from the inclusion, as an illustration in § 114(b)(4)(B), of the process of furnacing quicksilver ores, which involves a chemical change.

It would also be helpful, in a preliminary way, to observe that the depletion allowance is not an allowance upon any *process*, whether a mining process or a manufacuring process. Nor is it an allowance, as such, upon any product. Instead, it is an allowance to the mine owner designed as a simple means to diminish his taxable income from the exploitation of a natural resource which is necessarily exhausted in the process. In making this allowance, the Congress has elected not to limit the deduction in all cases to the taxpayer's actual cost or other basis in the land from which the ore or mineral is extracted. To supply a simpler rule, the Congress has turned more and more to the method of percentage depletion, which differs from both cost and discovery value depletion in that it is measured by an arbitrary percentage of gross income from the property, without regard to the taxpayer's cost or discovery value.

From the foregoing it is clear that by the enactment of 1943 the Congress for the first time introduced into the

statute key language which had not theretofore appeared either in the statute or in the regulations thereunder, namely, a new definition of "gross income from mining" as including "not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products." Notwithstanding this, the Commissioner has subsequently sought, by regulatory amendments to § 29.23(m)-1(f) of Treas. Reg. 111, in cases where the mine owner customarily had to indulge in further processing other than merely extractive operations before obtaining a commercially marketable product upon which he could realize any income, to prescribe a relatively complex mathematical method for calculating the percentage depletion base. This would require an allocation of income derived from the sale of the first marketable product to the various treatment processes in proportion to their cost, with only those processes allowed as part of the base which occurred before any chemical change had taken place in the extracted mineral.

By § 319 of the Revenue Act of 1951 (65 Stat. 497), the Congress amended § 114(b)(4)(A) of the Internal Revenue Code so as to extend the availability of percentage depletion for the first time to "calcium carbonates," which includes deposits of cement rock, the natural resource involved in the case at bar. The prescribed percentage for calcium carbonates was ten per cent of the gross income from mining the deposit.

With the foregoing stated by way of background, it will perhaps be easier to understand the significance of the facts in the present case.

Throughout the tax period in question, Lawrence Portland Cement Company, the taxpayer-appellant's predeces-

sor, owned and operated two quarries, one in Maine and the other in Pennsylvania, from which it extracted cement rock, a calcium carbonate suitable for conversion into cement. The operations began with drilling and primary blasting from the face of the quarry by the open pit method to obtain the cement rock, which was then broken into manageable size by secondary blasting and loaded by shovels into dump trucks which carried it to an inclined railway where it was deposited into dump rail cars for transportation to the near-by plant.

Treatment or "beneficiation" then occurred at the plant in the following processes: The dump rail cars deposited the cement rock into a large primary crusher, which reduced the size of the extracted rock to pieces with a maximum dimension of about eight inches. After this primary crushing, the cement rock fell onto a conveyor belt which carried it to a secondary crusher which further reduced the size of the rock. From the secondary crusher a conveyor belt carried the cement rock to a shed, from which it was picked up by an overhead crane which deposited the desired quantities into a hopper, over which a coarse bar grate was fitted to screen the crushed cement rock. From the hopper, the screened cement rock was gravity fed to a ball mill where it was ground with water to a proper fineness known as "slurry," which was then conveyed to a wet "slurry" tank where it was kept in suspension by a revolving paddle mechanism. The "slurry" was then run off to filters where much of the water was removed, and the resulting filter cake was thereafter conveyed by belt to rotary kilns.

There is no dispute that the gross income allocable to the operations thus far described may be included in determining the gross income from mining of the mineral, cement rock, for the purpose of calculating the base to

which the allowable percentage depletion is to be applied. But it was found as a fact by the trial court, and we understand that this is not controverted by the government, that except in negligible amounts, which may be disregarded, "there is no commercial market for cement rock. The first commercially marketable product is cement. The methods used by taxpayer to transform cement rock into cement are admitted to be the 'ordinary treatment processes normally applied by mine owners or operators' who produce cement."

Accordingly, the taxpayer's predecessor had to engage in further processes before obtaining a marketable product, cement, upon which gross income could be realized. The so-called filter cake was run into the upper end of rotary kilns, which were in the form of long rotating cylinders set at a slight inclination, the filter cake gradually traveling toward the lower end of the kiln. Hot gases from a flame at the lower end evaporated the water from the filter cake and burned the remaining material to a dense clinker. The clinker was then conveyed to a grinding mill where it was ground to the fineness of cement; the cement was finally placed in silos from which it was loaded and shipped in bags or in bulk. It is conceded that these last processes effected a chemical change in the cement rock, transforming it from its crude mineral state into cement, which is synthetic and not a mineral.

The dispute here involves the propriety of including income allocable to the kiln and post-kiln processes in gross income from mining, as defined; if such processes are excluded, the depletion allowance for the taxable period would be $204,859.19, whereas, if such processes are included, the allowable depletion would be $795,852.60.

It is contended by the government that mining terminated, and that the depletion base was arrived at, when the mine operator had prepared the cement rock for conver-

sion, and that the subsequent operations, during which it underwent a chemical change and ceased to be a mineral, constituted a manufacturing process, not allowable in computing the depletion base. As indicated above, this contention is fully supported by Treas. Reg. 111, § 29.23(m)-1(f), but the taxpayer maintains that the regulation is invalid in this respect because the definition of "gross income from mining", inserted in § 114(b)(4)(B) in 1943, does not permit such an interpretation, but on the contrary compels the opposite result. Although the district court upheld the government's view, we find ourselves in agreement with the taxpayer.

Preliminary to upholding the government's asserted interpretation, the district court concluded that the statutory language, "commercially marketable mineral product or products", was intrinsically ambiguous. One possibility, the district court said, was to construe the phrase as permitting the depletion allowance to extend to a product of a mineral, although the end product may be a synthetic nonmineral (*viz.*, a commercially marketable mineral *product*). The second possibility, said the district court, was to construe the statutory phrase as restricting the depletion allowance to products still in a mineral state (*viz.*, a commercially marketable *mineral* product).

We are unable to perceive that the statutory language contains any such inherent ambiguity. In this connection it should be observed that three other courts of appeals which have had occasion to weigh the government's arguments advanced in the case at bar, and to construe the critical statutory phrase, have held it to be "clear and unambiguous" in favor of the taxpayer's interpretation. See *United States* v. *Cherokee Brick & Tile Co.*, 218 F. 2d 424, 425 (C.A. 5th, 1955); *Townsend* v. *The Hitchcock Corp.*, 232 F. 2d 444, 446 (C.A. 4th, 1956); *United States* v. *Sapulpa Brick & Tile Corp.*, 239 F. 2d 694, 697 (C.A. 10th,